

The Inadequate Protection of Human Rights in Unfair Dismissal Law

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Abstract

Workers in the private sector have limited legal options if they believe that, by terminating the working relationship, the employer has infringed their human rights. In most cases, they must rely on an existing cause of action, notably the right not to be unfairly dismissed contained in the Employment Rights Act 1996. The provisions of the Human Rights Act 1998 reinforce the argument that unfair dismissal law should play a role in the vindication of human rights in the employment context. Is the law of unfair dismissal capable of fulfilling this role? This article will argue that it is not. It will demonstrate that there are several major obstacles to the vindication of a worker's human rights through unfair dismissal law. It will be argued that there are three ways in which the law of unfair dismissal is inconsistent with the principles of the European Convention on Human Rights: the narrow personal scope of protection, the lax standard of review applied by the tribunals, and the inadequate remedies available to claimants who are successful in their claim.

1. INTRODUCTION

Employers have demonstrated a propensity to take decisions that infringe the human rights of their workers. With unfortunate regularity, workers are dismissed for reasons that are connected with an exercise of their fundamental rights: for example, due to their association with a controversial political party,¹ because the manner in which they manifest their religious beliefs does not fit with the company's corporate image² or as a result of their activities outside

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¹ *Redfearn v Serco Ltd* [2006] EWCA Civ 659, [2006] ICR 1367. For commentary, see Hugh Collins and Virginia Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 MLR 909.

² See *Eweida v British Airways Plc* [2010] EWCA Civ 80, [2010] ICR 890; *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 and C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017] IRLR 466. For commentary on freedom of religion in the workplace and *Eweida and others v United Kingdom* (2013) 57 EHRR 8, see Ronan McCrea, 'Religion in the Workplace' (2014) 77 MLR 277.

of work, such as their intimate life³ or social media presence.⁴ The loss of a job has severe consequences for any individual, damaging his or her financial resources as well as their reputation, self-esteem and opportunities for social interaction. Adding the affront of a human rights violation to such a situation only magnifies the distress and hurt that they experience. Ensuring that individuals in this position are able to challenge their employer's wrongdoing and receive a remedy for a serious infringement with their human rights is therefore a pressing concern for labour law.⁵

What legal mechanisms currently protect workers against unjustified interference with their human rights at work? A worker in the public sector may make a claim against their employer for acting incompatibly with the European Convention on Human Rights (ECHR) under the Human Rights Act 1998 (HRA 1998).⁶ Workers in the private sector must rely on existing labour law claims. Some human rights are specifically vindicated by employment law. For instance, the right not to be discriminated against is protected by the Equality Act 2010. Protection for whistleblowers was introduced by the Public Interest Disclosure Act 1998, as

³ See *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634 and *Pay v Lancashire Probation Service* [2004] ICR 187. For commentary, see Astrid Sanders, 'The Law of Unfair Dismissal and Behaviour outside Work' (2014) 34 LS 328, Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912 and Virginia Mantouvalou and Hugh Collins, 'Private Life and Dismissal' (2009) 38 ILJ 133.

⁴ *Crisp v Apple Retail UK Ltd* [2011] ET/1500258/11 and *Game Retail Limited v Laws* (2014) UKEAT/0188/14/DA. For commentary on free speech rights in the employment context, see Paul Wragg, 'Free Speech Rights at work: Resolving the Differences between Practice and Liberal Principle' (2015) 44 ILJ 1.

⁵ This is reflected in the building literature regarding safeguarding human rights in the context of work: see for example the literature cited above, as well as Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland (ed), *The Contract of Employment* (Oxford: Oxford University Press, 2016), Alan Bogg and Keith Ewing, 'The Implications of the *RMT* Case' (2014) 43 ILJ 221, Astrid Sanders, 'A "right" to legal representation (in the workplace) during disciplinary proceedings?' (2010) 39 ILJ 166, Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 MLR 619, and Keith Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 ILJ 1.

⁶ See, for example, *R. (on the application of G) v X School Governors* [2011] UKSC 30, [2012] 1 AC 167 with regard to Article 6 and the right to be legally represented in disciplinary proceedings.

required by the jurisprudence of the European Court of Human Rights (ECtHR).⁷ Similarly, Part III of the Trade Union and Labour Relations (Consolidation) Act 1992 protects workers from being subjected to detriment on the grounds that they choose to exercise their freedom to associate with a trade union.⁸ The Charter of Fundamental Rights of the European Union may also be directly effective in the private employment relationship in a limited range of circumstances.⁹ If a worker's complaint of an infringement of their fundamental right does not fit within the scope of these specific claims, the only option is bring other, more general claims and attempt an indirect route to vindication. The question is whether these indirect routes are up to the task of providing an effective legal route to protecting the human rights of workers against unjustified infringements by their employer.

The main focus of this article will be the right, set out in the Employment Rights Act 1996 (ERA 1996), against unfair dismissal. Claimants have already attempted to shape unfair dismissal law with human rights concerns,¹⁰ suggesting that it will be the favoured instrument chosen for litigation of this kind. Under the HRA 1998, the courts and tribunals are included as public authorities that must act compatibly with the Convention in section 6(3) and further, under section 3, they must interpret domestic statutes in a manner that is compatible with the Convention as far as it is possible to do so. Although the criticisms made below relate solely to the law of unfair dismissal, many of the comments are equally applicable to other areas of

⁷ The principles of freedom of expression that apply in circumstances of whistleblowing are set out in *Guja v Moldova* (2011) 53 EHRR 16 at [72]-[79] and *Heinisch v Germany* (2014) 58 EHRR 31 at [63]-[70].

⁸ See, in particular, TULR(C)A 1992, section 137 relating to refusal of employment on grounds related to trade union membership, and sections 146 and 152 protecting workers from detriment or dismissal on grounds related to trade union memberships.

⁹ *Benkharbouche v Embassy of the Republic of Sudan*; *Janah v Libya* [2015] EWCA Civ 33, [2015] 3 WLR 301 at [73]-[81].

¹⁰ See *X v Y*, n. 3 above, *Pay v Lancashire Probation Service*, n. 3 above, and *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 525.

labour law such as the common law of the contract of employment, which rely on similar legal concepts and seem to be similarly narrow in scope or limp in their protection for human rights.

It must be admitted that the law of unfair dismissal was not introduced in order to vindicate the human rights of workers. The legislation was intended to protect employees against unfair disciplinary action and to provide a mechanism for the peaceful resolution of disputes.¹¹ However, the function of vindicating fundamental rights is in line with Hugh Collins' interpretation of the foundations of unfair dismissal law as demonstrating a 'concern for the protection of individual rights in the workplace', particularly 'the protection of autonomy and dignity against the potential for abuse of bureaucratic power.'¹² The concern that the employer's managerial power should not be used in a manner that offends the dignity and autonomy of workers is reflected by international human rights documents, such as the European Social Charter¹³ and the EU's Charter of Fundamental Rights,¹⁴ which include the right of workers to protection in dismissal, particularly the right that a dismissal should be for a legitimate and justifiable reason. In addition, the idea that the law of unfair dismissal should become a vehicle for the protection of the human rights of workers is mandated by the positive obligation placed upon member states by the European Court of Human Rights (ECtHR) to protect individuals against an interference with their human rights by private individuals and

¹¹ *Royal Commission on Trade Unions and Employers' Associations Report* (1968, Cmnd 3623).

¹² Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford: Oxford University Press, 1992) 272.

¹³ Revised European Social Charter (3 May 1996, European Treaty Series No. 163), Article 24.

¹⁴ The Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Article 30.

One might use the text of Article 30 to critique the law of unfair dismissal. For example, one might note the difference in personal scope of the respective rights and further ask whether protecting from 'unjustified dismissal' demands a higher standard of treatment than the domestic 'unfair dismissal'? Whilst these are interesting issues, it is unlikely that a legal challenge framed in this way would be successful as the EU is yet to exercise its competence in the area of general individual dismissal protection. The challenge would therefore fail as unfair dismissal is not 'implementing Community law' and therefore the Charter is not applicable: see, for further detail, Catherine Barnard, 'The Charter in time of crisis: a case study of dismissal' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge: Cambridge University Press, 2013), C-488/21 *Sándor Nagy v Hajdú-Bihar Megyei Kormányhivatal* [2013] OJ C79/3 and *Benkharbouche v Embassy of the Republic of Sudan*; *Janah v Libya*, n. 9 above, at [74].

organisations.¹⁵ Many European states, including the UK on a number of occasions,¹⁶ have accepted that this positive duty entails that human rights have a strong influence upon private law, which has been termed ‘strong indirect horizontal effect’.¹⁷ Thus, courts should usually reach a decision in disputes between a worker and their employer that respects the human rights of both parties.¹⁸

The aim of this article is to expose the limitations upon the capacity of unfair dismissal to vindicate the human rights of workers. There are extensive gaps in the protection that it provides, leaving many private sector employees without an avenue to gain protection for their rights. The examination will be divided into three parts. In section 2, a prominent problem and an initial obstacle for claimants attempting to use an unfair dismissal claim to launch a human rights complaint will be considered: the narrow personal scope of protection provided by unfair dismissal law. Human rights are available universally to all persons, as indicated in Article 1 of the Convention. If the mechanism of unfair dismissal is to prove an effective means of vindicating one’s human rights, therefore, the cause of action should be similarly available universally across the workforce.¹⁹ Section 2 will highlight the points at which the personal scope of unfair dismissal law fails to meet this requirement. I will concentrate upon the

¹⁵ See the ECtHR judgment in *Redfearn v United Kingdom* (2013) 57 EHRR 2 at [43], [50], [52] and [57].

¹⁶ See for example *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *X v Y*, above n. 3; although these cases might be compared with the view expressed in *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273 at [40]-[47] that Parliament had already balanced the competing interests involved in a repossession case. Therefore, courts are not required to consider the proportionality of granting a possession order in each particular case.

¹⁷ See Alison Young, ‘Mapping Horizontal Effect’ in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011) 42-44 and Gavin Phillipson, ‘The Human Rights Act, ‘Horizontal Effect’ and the Common Law: a Bang or a Whimper?’ (1999) 62 MLR 824, 830-831.

¹⁸ See *Hall and Preddy v Bull and Bull* [2013] UKSC 73, [2013] 1 WLR 3741 at [41]-[55] for an example, in the context of service provision, of Lady Hale ensuring the outcome reached by applying anti-discrimination law struck a balance between the Article 9 rights of Christian hoteliers and the Article 8 rights of a gay couple who were refused a double room.

¹⁹ Collins and Mantouvalou, ‘Human Rights and the Contract of Employment’, above n. 5, at 198-199.

approach of the domestic and Strasbourg courts towards individuals participating in non-standard working arrangements, who are not entitled to the right not to be unfairly dismissed but are protected by the Convention. The third section will examine the standard of review in unfair dismissal. When compared to the stringent scrutiny applied by the ECtHR through its proportionality analysis, the ‘range of reasonable responses’ test is inadequate. The ‘range of reasonable responses’ test permits extreme deference to the employer’s judgment and often entirely misses glaring infringements of a worker’s human rights. Where an infringement is noticed, the proportionality element that has been inserted into the review process is applied half-heartedly and rarely in favour of the claimant. In the fourth section, I will question whether the remedies available to claimants after a successful unfair dismissal claim are sufficient to vindicate the infringement of their human rights.

2. LIMITED PERSONAL SCOPE OF UNFAIR DISMISSAL

The focus of this section will be the scope of protection offered by unfair dismissal law. Every human being is entitled to protection of their human rights.²⁰ For unfair dismissal to be an effective vehicle for the defence of those rights, its personal scope should be similarly universal.

A. The barriers to an unfair dismissal claim

Unfortunately, however, the protection of unfair dismissal law is available only to a narrow class of individuals in the workforce. There are four requirements that individuals must fulfil in order to pursue an unfair dismissal claim, each with the potential to deny claimants access to judicial review of their employer’s decision to dismiss.

²⁰ For a more general discussion of the impact of a human rights perspective on the personal scope of employment law, see Collins and Mantovalou, *ibid*.

- (1) The requirement that there must be a contract between the dismissing entity and the individual.
- (2) This contract must be enforceable – i.e. not tainted by illegality, affected by diplomatic immunity or unenforceable through some other rule of general contract law.
- (3) The contract must not be within a category excluded by the Employment Rights Act 1996 (ERA 1996) – an independent contractor’s bargain or a contract regarding an occupation listed by the ERA 1996.²¹
- (4) The individual must have completed the qualifying period of service with the relevant employer.²²

I will discuss briefly the first, second and fourth requirements before considering the third in more detail.

The first requirement particularly impacts upon agency workers. They are caught in a triangular arrangement under which they have a contract with their agency, who supplies the worker’s services under a separate contract with the end user. There is no express contract between worker and end user and the courts have refused to imply a contract between those parties in most circumstances.²³ Because of this lack of a contractual link, if the end user takes the decision to terminate the engagement, the agency worker has no right under section 94 ERA against the end user. This prevents an estimated 1-1.5 million agency workers in the UK from gaining the protection of unfair dismissal law, even where a breach of their human rights has arguably taken place.²⁴ For example, Mr Muschett in *Muschett v HMPS* was denied a claim for

²¹ Employment Rights Act 1996, sections 199, 200 and 230(2).

²² Ibid, section 94.

²³ *James v Greenwich London Borough Council* [2008] EWCA Civ 35, [2008] ICR 545.

²⁴ This gap in protection for agency workers is not unique to unfair dismissal law: in *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] IRLR 467, Mr Smith was found to lack a contract between himself and the entity that was responsible for blacklisting him, with the result that he could not make claims under TULR(C)A 1992 and ERA 1996. Alan Bogg comments that the decision ‘constitutes a

the alleged race discrimination that he suffered due to the lack of a contract between himself and the end user, the Prison Service.²⁵ The ECtHR, in contrast, has no difficulty providing protection in triangular employment arrangements, such as *Martinez v Spain* where the claimant was selected by the Church but provided his services to a local school. The Court analysed the interference with the complainant's Article 8 rights, despite the unusual nature of his position and that the breach with his rights was arguably perpetrated by two parties jointly.²⁶

The second requirement – the need for an enforceable contract – operates to deprive workers who are already in a vulnerable position in the UK of the opportunity to use unfair dismissal law to challenge their employer's conduct. Two groups of claimants have come to the fore recently in the case law. The first are workers whose contracts may be tainted with illegality due to their irregular migration status.²⁷ It is hoped, however, that the Supreme Court's revised approach to the illegality defence set out in *Patel v Mirza* has improved the position of many of these workers. As the new approach is based upon public policy considerations and a proportionality assessment,²⁸ there is every chance that denying an unfair dismissal claim grounded upon a human rights infringement would be considered disproportionate in all but the most extreme cases of illegality. This brings the UK closer to the position of the ECtHR on matters of illegality, but in those exceptional cases, we would still be out of step, as in the ECtHR the legality of the claimant's actions or status are almost never relevant.²⁹ The second group of workers affected by this requirement are those who are employed by an entity covered by the State Immunity Act 1978, which preserves immunity for

signal failure to protect the claimant's fundamental rights at common law': Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 CLP 67, at 109.

²⁵ *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451.

²⁶ *Martínez v Spain* (2015) 60 EHRR 3.

²⁷ See *Hounga v Allen and another (Anti-Slavery International intervening)* [2014] UKSC 47, [2014] 1 WLR 2889 and Alan Bogg and Sarah Green, 'Rights Are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts' (2015) 44 ILJ 101.

²⁸ *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399, at [120] per Lord Toulson.

²⁹ See *Siliadin v France* (2006) 43 EHRR 16.

‘proceedings concerning the employment ... of the members of a consular post’.³⁰ The position of workers in Embassies in the UK came under scrutiny in *Benkharbouche v Embassy of the Republic of Sudan*, in which two claimants launched a range of complaints, including unfair dismissal.³¹ The Court of Appeal held that the failure to allow these workers to access a tribunal was in breach of Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the EU. The claims based upon EU were permitted to progress on the basis of the direct effect of EU, but the unfair dismissal claims were rejected, subject to the court’s Declaration of Incompatibility under the HRA 1998. Although the number of workers employed by Embassies and other diplomatic services may be small, their inability to challenge poor treatment through labour law claims is a serious issue and leaves them exposed to harsh conduct, possibly including human rights infringements.³²

Finally, the individual must have completed a qualifying period of service with their employer before they become entitled to the right not to be unfairly dismissed. This gap in protection was criticised by the ECtHR in *Redfearn v UK*, in which the claimant, a driver, was dismissed as a result of his election to local government on behalf of a controversial political party. The Court held that the UK had a positive duty under Article 11 to protect employees from dismissal on the grounds of their political belief and this extended to all employees, regardless of their length of service.³³ The UK government responded to this criticism by introducing a minor amendment to the operation of the qualifying period: it no longer applies to dismissals in which the reason for dismissal was the employee’s political opinions or affiliations.³⁴ This change brings the UK into line with the letter of the Strasbourg dicta. As has

³⁰ State Immunities Act 1978, section 16(1)(a).

³¹ *Benkharbouche v Embassy of Sudan*, above n. 9.

³² Ms Janah, employed by the Libyan Embassy in London, for example, brought claims of race discrimination and harassment, indicating that her employer may have breached her human rights in several instances.

³³ *Redfearn v United Kingdom*, above n. 15, at [57]

³⁴ Enterprise and Regulatory Reform Act 2013, section 13.

been observed by Hugh Collins and Virginia Mantouvalou, however, the Court's reasoning in *Redfearn* 'is equally applicable to all Convention rights that create positive obligations on parties to the Convention'³⁵ which currently includes Article 8's right to respect for private life, Article 9 on freedom of religion and Article 10's freedom of expression. The Court has previously transferred its reasoning between Articles 8, 9, 10 and 11,³⁶ so it is very likely that the positive obligations as phrased and applied in *Redfearn* under Article 11 would be similarly applicable to those other articles. Thus, the remaining scope of applicability of the qualifying period leaves serious deficits in protection in circumstances where other ECHR articles may be breached, which may be incompatible with other Convention rights.

B. Who is an employee?

This section will compare the ECtHR approach to issues of personal scope to that of UK labour law under unfair dismissal law. The question for the English courts is whether the individual is an employee under a contract of service, entitled to protection under sections 94 and 230 ERA 1996, or a business person offering their work under a contract for services. Comparably, with regard to Article 11 and entitlement to the special aspects of freedom of association available only to trade unions such as the right to collectively bargain³⁷ and the right to strike,³⁸ the question for the Strasbourg court is whether the complainant is providing their services in the context of an employment relationship.³⁹

We might contrast an ECtHR decision with the English Court of Appeal's findings in two domestic cases to demonstrate the divergence in approach to these questions. In *Sindicatul Păstorul cel Bun v Romania*, the Court was required to ascertain whether a group of clergymen

³⁵ Collins and Mantouvalou, '*Redfearn v UK: Political Association and Dismissal*', above n. 1, 915.

³⁶ See for example *Eweida and others v United Kingdom*, above n. 2, at [83].

³⁷ *Demir v Turkey* (2009) 48 EHRR 54.

³⁸ *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10.

³⁹ *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10, at [141].

and lay members of the Romanian Orthodox Church were in an employment relationship, such that their association might be entitled to protection as a trade union under Article 11. The Court drew two points from the materials of the International Labour Organisation.⁴⁰ First, it found that the existence of an employment relationship should be determined by a consideration of the facts, rather than how the relationship is characterised by any agreement between the parties. Second, the ILO states that workers have the right to establish collective organisations without any distinction. The Court went on to find that the duties carried out by the union's members had many of the 'characteristic features of an employment relationship'.⁴¹ The Bishop appointed the individuals and set out their rights and obligations. Under his leadership, they carried out their assigned tasks, being paid by the Church or through state funds. Employer's tax contributions were paid by the Church and the individuals were entitled to the same range of welfare and social security benefits as ordinary employees. The 'special features' of their work - the spiritual purpose of their role and the heightened duty of loyalty to which the clergymen were subject – were not sufficient to remove the individuals from the scope of Article 11's protection. Here, it seems that the ECtHR's starting point was that all individuals should be entitled to protection as workers within a trade union,⁴² and to support this assumption, the Court looked for points of similarity with a standard employment relationship, rather than differences. The ECtHR's holistic and untechnical assessment examined the true essence of the relationship, a sharp contrast to the equivalent process in domestic law.

There are two particular points of contrast with the domestic perspective on issues of personal scope. The first is how differently the courts deal with non-standard working

⁴⁰ Ibid, at [142].

⁴¹ Ibid, at [143].

⁴² See *ibid* at [145]: 'the question to be determined is rather whether such special features are sufficient to remove the relationship between members of the clergy and their church from the ambit of Article 11.'

relationships, with religious officials here serving as the example. *Sindicatul Păstorul* can be compared with the Court of Appeal's decision in *Sharpe v Bishop of Worcester*.⁴³ Mr Sharpe was a parish rector who claimed constructive unfair dismissal after making a disclosure that he considered to be in the public interest. As a rector for the Church of England, his working relationship shared many of the unusual features with the priests' employment above. Despite this, the Court of Appeal reached the opposite conclusion on whether Mr Sharpe's working relationship merited the protection of labour law.⁴⁴ Crucial in Lady Justice Arden's decision was the lack of any intention to create legal relations and that there was no need to imply a contract because Mr Sharpe's role was carried out in accordance with the terms of his office which were defined by law.⁴⁵ With regard to whether Mr Sharpe was an 'employee', her Ladyship noted that he was not paid a wage directly from his employer and that the Bishop, his 'manager', had very few disciplinary processes easily available to him.⁴⁶ These factors led Lady Justice Arden to the conclusion that Mr Sharpe was not an employee entitled to bring an unfair dismissal claim. The focus on technical doctrines of contract law and the minutiae of Mr Sharpe's working arrangement is notable in *Sharpe*, and the result shows a clear divergence of opinion with the ECtHR on the entitlement to rights protection of those outside the realms of standard employment relationships.

As a whistleblower, Mr Sharpe would be considered under the ECHR to be protected by Article 10's freedom of expression.⁴⁷ This fact had no impact on the findings of the domestic courts. The courts' lack of concern for the need to remedy a human rights infringement is the

⁴³ *Sharpe v Worcester Diocesan Board of Finance Ltd and another* [2015] EWCA Civ 399, [2015] ICR 1241.

⁴⁴ For a more detailed analysis of *Sharpe*, see ACL Davies, 'The Employment Status of Clergy revisited: *Sharpe v Bishop of Worcester*' (2015) 44 ILJ 551.

⁴⁵ *Sharpe v Bishop of Worcester*, above n. 43 at [44]-[47]. Her Ladyship used these observations to deny that Mr Sharpe had any contract at all with the Diocese, in much the same way as the courts refuse to imply a contract between agency worker and end user.

⁴⁶ *Ibid*, at [85]-[89].

⁴⁷ See *Guja v Moldova*, above n. 7, and *Heinisch v Germany*, above n. 7.

second point of divergence with the ECtHR. In a similar way to *Sindicatul Păstorul*, the employer in *O'Kelly v Trusthouse Forte* took a hostile stance to their workers exercising their fundamental freedom to join a trade union and participate in its activities.⁴⁸ The ECtHR has consistently demonstrated a determination that the protection of fundamental rights should be available and applicable as universally as possible.⁴⁹ In contrast, the Court of Appeal in *O'Kelly* showed no anxiety over the fact that their decision that a group of 'regular casual' waiters were independent contractors would deprive the workers of any opportunity to challenge their dismissal, which was arguably a direct result of their activities as members of the Hotel Catering Workers Union. If *O'Kelly* were decided today by the ECtHR, it is almost certain that the employer's actions would be considered an unjustified interference with the waiters' Article 11 rights and that the UK, in denying them the opportunity to challenge their dismissal, would have failed in its positive obligations to protect Article 11 rights in relations between private parties.

This section has exposed a significant disparity between the scope of protection of unfair dismissal and the universality of ECHR rights. Further, the starting point of the international and domestic courts, and their subsequent approach to determining the employment status of an individual and their consequent entitlement to important rights, differ greatly. Dominated by technical legal tests of employment law and the details of contract law, the English approach narrowly confines the availability of unfair dismissal to traditional employment relationships whereas the ECtHR emphasises that human rights protection should be as broadly available as possible. This is just one part of the deeper problem exposed in Section 2. Any attempt to vindicate an individual's human rights through the use of an unfair dismissal claim is at risk of falling at the first hurdle: gaining access to a tribunal to review

⁴⁸ *O'Kelly and Others v Trusthouse Forte Plc* [1983] 3 WLR 605, [1984] QB 90.

⁴⁹ See *Demir v Turkey*, n. 37 above, at [97].

their case. This is incompatible with the universal aspirations of human rights law, and could certainly be the subject of a challenge under Article 6's right to a fair trial, which includes a right to access a court for the determination of civil claims.⁵⁰ The problem exposed in this first part, of not one but four possible barriers to getting a claim to court, amounts to the most fundamental challenge to the ability of unfair dismissal law to vindicate the human rights of claimants. Human rights arguments would test the basic assumption that employment law protection should be confined to a limited class of persons taking part in a particular kind of working relationship.⁵¹

3. PROPORTIONALITY AND FAIRNESS: CONTRASTING STANDARDS OF REVIEW

In contrast to the UK tribunals' lack of concern to reconcile the personal scope of labour rights with the universality of human rights protection, there has been consideration of how the standard of fairness should be infused with the more stringent standard used in human rights law. Section 3 will question whether this reconciliation of two contrasting standards has been successful in practice or whether, in fact, claimants are left inadequately protected through the application of a lax standard of review of the employer's infringement. First, this section will outline the standard of proportionality review used by the ECtHR, which requires that the infringing body demonstrates a legitimate reason that justifies their actions and balances a broad range of factors in the assessment of proportionality. Section 3 will then consider the domestic examination of fairness, under the guise of the 'range of reasonable responses'. It will

⁵⁰ See for example, the ECtHR's disapproval of the striking out of negligence claims at the duty of care stage: *Osman v United Kingdom* (2000) 29 EHRR 245. The CFREU's right to an effective remedy has been used to challenge rules – such as diplomatic immunity – that exclude workers from accessing a court and vindicating their rights: see *Benkharbouche v Embassy of the Republic of Sudan*; *Janah v Libya*, above n. 9. It could be an additional means to challenge the narrow scope of some labour law rights.

⁵¹ Hugh Collins and Virginia Mantouvalou have considered how this clash of presumptions might affect the contours of labour law: Collins and Mantouvalou, 'Human Rights and the Contract of Employment', above n. 5, 199-200.

be demonstrated that, even with the addition of some proportionality-style analysis, the standard of review is insufficient to protect the human rights of workers in a manner consistent with the approach of the Strasbourg Court. Despite the declaration by the Court of Appeal of a clear framework for dealing with dismissal cases with human rights implications, the tribunals often neglect to apply it in circumstance where it would be appropriate. Further, the addition of a layer of proportionality considerations has not corrected the inclination of tribunals to find in favour of employers, accepting the employer's assessment of the situation and whether a dismissal was a fair or proportionate response.

A. The Convention's standard of justification

Under the qualified rights of the Convention, a defendant is permitted the opportunity to justify their infringing behaviour. This takes place under the second subsection of the relevant Article – here I am examining particularly Articles 8, 9, 10 and 11 which rely upon the application of a proportionality assessment. There are three elements to the justification process:

1. The interference must be 'prescribed by law'.
2. The interference must pursue a 'legitimate aim'. Included in the listed aims are national security and public safety, the protection of health and morals and the protection of the rights and freedoms of others. In cases of dismissal, employers often appeal to the right to protect their business' reputation, which is within the scope of the latter aim.
3. That the interference was 'necessary in a democratic society' – to determine this, the Strasbourg Court asks whether the interference was proportionate to the aim pursued.

What does the Court consider relevant to a proportionality assessment in a case of dismissal? First, the Court has indicated that a dismissal will be not be a proportionate infringement of a

human right if a less severe course of action might have been available to the employer.⁵² The Court also considers dismissal a very serious form of interference with an individual's human rights⁵³ – the individual's loss of livelihood and job security, the impact upon their personal life and reputation and the difficulty of getting a new job are all considerations for the Court. More generally, the ECtHR makes an assessment of the seriousness of the infringement: if the dismissal impacts upon the essence or core of the content of the right, the infringer will have to plead a very serious reason for the infringement and produce strong evidence of its necessity.⁵⁴ The Court will also take into account the duty of loyalty owed to the employer, particularly in cases regarding civil servants.⁵⁵ One point of criticism that might be levelled at the ECtHR is its failure to demand that the employer demonstrate that the claimant has created a real risk of damage to their reputation in the public sphere, which is sufficiently imminent to justify dismissing the individual. Without such a demonstrable risk, the requirement that the infringement pursue a legitimate aim is an empty one. In general, however, the ECtHR's review of the justification of an infringement is focused on the harm done to the individual and ensuring that the employer had a sufficiently serious reason to interfere with their human rights.

The proportionality test has been applied at varying degrees of intensity. Described above is the strictest examination process, used when the Court reviews a decision to dismiss an individual that is taken by the national authority itself.⁵⁶ In this vertical case of infringement, the proportionality standard is at its most exacting. In a horizontal case, where the infringing party is private entity such an employer, the standard of review is different. As the tribunal with the closest contact with the facts of the case, the ECtHR considers national court to be

⁵² See *Pay v United Kingdom (Admissibility Decision)* (2009) 48 EHRR SE2, at 26 and *Fuentes Bobo v Spain* (2001) 31 EHRR 50 at [49].

⁵³ *Vogt v Germany* (1996) 21 EHRR 205, at [60]; *Schiith v Germany* (2011) 52 EHRR 32, at [73].

⁵⁴ *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, at [90].

⁵⁵ *Vogt v Germany*, above n. 53, at [58] and *Guja v Moldova*, above n. 7, at [70]-[71].

⁵⁶ See, for example, *Vogt v Germany*, above n. 53.

best placed to assess the necessity of the infringement and grants it a margin of appreciation in judging the proportionality of an interference. If the national court has struck a fair balance between the interests of the employer and the rights of the individual, its decision will be within the margin of appreciation and there will be no infringement of the applicant's Convention rights.⁵⁷ Which standard should the UK tribunals be held to – a full proportionality analysis or simply striking a fair balance between the interests at stake? I argue that the domestic tribunals, in reviewing the dismissal and its compatibility with a worker's Convention rights through the vehicle of unfair dismissal law, are performing the same function as that of the ECtHR when deciding a vertical dismissal case – that of the first external reviewer of a decision. They must demand the employers produce a legitimate aim for the infringement, and conduct a full proportionality assessment, taking into account the range of factors outlined above. Such a process would ensure that the claimant's Convention rights are properly protected, rather than permitting a derogation from those rights based on flimsy evidence or employer supposition.

B. Fairness and the 'range of reasonable responses'

The statutory language of the ERA 1996 states that a dismissal will be fair if the employer acted reasonably in treating the reason submitted as a sufficient reason for dismissal.⁵⁸ This has been judicially interpreted to mean that 'if a reasonable employer might reasonably have dismissed him, then the dismissal was fair.'⁵⁹ The 'range of reasonable responses' (RORR), in which reasonable employers might reasonably take different views, is crucial in determining whether a dismissal was fair or unfair. Importantly, the higher courts have repeatedly emphasised that tribunals must not enter a 'substitution mindset': 'the employment tribunal should not put themselves in the place of management to decide whether they, the employment

⁵⁷ *Young, James and Webster v United Kingdom* (1981) 3 EHRR 20 [162]; *Fuentes Bobo v Spain*, above n. 52, at [38] and *Redfearn v United Kingdom*, above n. 15, at [42]-[43].

⁵⁸ ERA 1996, section 98(4).

⁵⁹ *British Leyland UK Ltd v Swift* [1981] IRLR 91, 93 (Lord Denning MR).

tribunal members, would have dismissed the applicant or not'.⁶⁰ David Cabrelli notes that the non-substitution principle deprives tribunals of the opportunity to 'articulate what ought to have been done by the employer'.⁶¹ This is a key element of the proportionality assessment: the court's ability to indicate to decision-makers that, for example, a less severe measure would have been more appropriate in the circumstances, on the basis of their objective assessment of the facts.

This is only one disparity between the 'range of reasonable responses' test and the proportionality standard utilised in Strasbourg. The domestic courts do not attempt to weigh the seriousness of the harm inflicted upon the claimant and the infringement with their human right, against the aim purported to be pursued by the employer. Rather, the tribunal checks that the employer's decision was in line with industry practice – essentially a check that other employers would have interfered with the claimant's human rights in the same way – and if so, the dismissal is lawful. This offers inadequate protection to the human rights of workers in circumstances of dismissal, despite Lord Justice Mummery's claim that '[c]onsiderations of fairness, the reasonable response of a reasonable employer, equity and substantial merits ought, when taken together ... to enable the employment tribunal to give effect to applicable Convention rights.'⁶² As argued by Hugh Collins and Virginia Mantouvalou, the focus of the proportionality test is much more on the impact of the interference upon the claimant, and ensuring the measure taken to protect the legitimate interests of the employer was as minimally intrusive as possible.⁶³ This leads to much stronger scrutiny of an employer's decision to

⁶⁰ *Beedell v West Ferry Printers* [2000] IRLR 650, 656. See also *Foley v Post Office, HSBC Bank plc v Madden* [2000] ICR 1283, [2000] IRLR 827.

⁶¹ David Cabrelli, 'Rules and Standards in the Workplace: a Perspective from the Field of Labour Law' (2011) 31 LS 21, 29.

⁶² *X v Y*, above n. 3, at [59]

⁶³ Collins and Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal', above n. 1, 921.

dismiss, which cannot be replicated by the application of an unaltered ‘range of reasonable responses’ test.⁶⁴

In light of the inadequacies of the domestic standard of fairness when contrasted with the ECtHR’s proportionality test, it was almost inevitable that claimants would argue that the former was failing to protect their human rights affected by a dismissal. In *X v Y*, the claimant received a caution for engaging in sex in a public toilet. He was dismissed after his employer discovered this, and that the claimant had failed to inform them of this situation. As he felt that the reason for his dismissal amounted to an infringement of his right to a private life under Article 8, he argued that the standard of fairness should be interpreted in light of the Convention and the tribunal should apply the proportionality test to ascertain whether the interference was justified. Lord Justice Mummery agreed that, if Article 8 were engaged upon the facts of the dismissal, then the tribunal should consider whether the interference was justified under Article 8(2).⁶⁵ In order to do this, Lord Justice Mummery directed tribunals to consider the proportionality analysis as part of their deliberations of fairness. Upon the facts of the case before him, however, the question of proportionality did not arise as his Lordship considered that Article 8 was not engaged by the reason for dismissal.⁶⁶

Has Lord Justice Mummery’s framework led to effective protection of Convention rights in dismissal cases which involve an infringement of human rights? Arguably, no. I would argue that surveying the cases decided since *X v Y* demonstrate that the standard of protection of human rights guaranteed through unfair dismissal law has not improved. There are two key

⁶⁴ This also contradicts two other claims made regarding the two standards of review. In *X v Y*, Lord Mummery claimed that the RORR test would not reach a conclusion incompatible with the Convention and, second, in *Turner v East Midlands*, above n. 10, Lord Justice Elias argued that ‘[i]t may even be that the domestic band of reasonable responses test protects human rights more effectively’ than Strasbourg: at [56]. I disagree with both statements for the reasons outlined here.

⁶⁵ *X v Y*, above n. 3, at [56].

⁶⁶ *Ibid*, at [51]-[52]. This finding has been criticised by Virginia Mantouvalou in ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’, above n. 3.

problems with the operation of the *X v Y* framework in practice. The first is that, despite clear human rights issues and possible infringements, in many cases, no attempt is made by the tribunals to apply Lord Justice Mummery's framework. This means that human rights infringements go unconsidered and claimants do not receive proper protection of those rights. The second issue is that, if a human rights issue is raised, the tribunals fail to engage in thorough scrutiny of the decision of the employer, both in terms of the legitimacy of the aim pursued and in terms of the decision's overall proportionality.

C. Missing the point: the tribunals' neglect of human rights issues

GM Packaging Ltd v Haslem concerned a small packaging company for whom the claimant had worked for 14 years before the events took place.⁶⁷ There were office rumours that Mr Haslem had been having a sexual relationship with a colleague, identified as LO. After a dispute between LO and the owner-manager of the company (GM), the manager saw the two parties engaged in sexual conduct on the company premises. These events occurred out of office hours. The next morning LO was dismissed. GM then challenged Mr Haslem about the incident and he admitted having an affair with LO, although he denied having sexual intercourse in the office. A recording also emerged later of Mr Haslem and LO speaking in derogatory terms about GM during the same incident. There was an investigatory meeting and following the meeting, Mr Haslem was dismissed. Ruling upon the appeal against the ET's findings in Mr Haslem's case for unfair dismissal, the EAT found that the reason for dismissal had been both the sexual activity between Mr Haslem and LO and their recorded conversation regarding GM. Applying only the standard 'range of reasonable responses' test, the EAT found the dismissal was fair.

⁶⁷ *GM Packaging (UK) Ltd v Haslem* (2014) UKEAT/0259/13/LA.

Haslem demonstrates perfectly the first criticism of the standard of review in unfair dismissal cases: that a tribunal can reach a decision on a case and yet completely miss that a human rights infringement has occurred. There are two separate Article 8 points that could have been raised. One, which should have been glaringly obvious, is that the conduct involved formed part of Mr Haslem's private life. To quote the ECtHR in *Pay v United Kingdom*, 'private life is a broad term not susceptible to exhaustive definition' but it includes one's sexual orientation and sexual life and one's right to establish relationships with other human beings and the outside world.⁶⁸ Further, the Court has stated that this protection for private life does not immediately cease upon entering a public space or working environment.⁶⁹ The EAT gives no indication that Article 8 considerations had entered its deliberation at all, despite the claimant's intimate relationship and its conduct in the office forming part of the reason for dismissal. A subtler Article 8 point is that of surveillance in the workplace. The conversation between Mr Haslem and LO regarding their manager was discovered because a recording device was left on in the office. The ECtHR has found on multiple occasions that surveillance in the workplace also engages the right to respect for one's private life.⁷⁰ The EAT did not examine at all whether the employer's use of this material in disciplinary proceedings was legitimate – particularly in light of the lack of prior warning of workplace surveillance.⁷¹ Their conversation could have been within the scope of the right to freedom of expression under Article 10. Legitimate criticism of one's employer or manager is protected, as is negative or offensive expression.⁷² The tribunals failed to recognise any of these potential interferences with Mr Haslem's human rights in their application of the RORR.

⁶⁸ *Pay v United Kingdom*, above n. 52, at 24.

⁶⁹ *Niemietz v Germany* (1993) 16 EHRR 97, at [29] and *Pay v United Kingdom*, *ibid*.

⁷⁰ *Halford v United Kingdom* (1997) 24 EHRR 523, 543; *Köpke v Germany* (2011) 53 EHRR SE26, at [37]-[38].

⁷¹ *Halford v United Kingdom*, *ibid*, 543.

⁷² *Sánchez v Spain* (2012) 54 EHRR 24, at [72]-[76].

There are two possible responses to this concern. The first is that the tribunals should be criticised for failing to adhere to Lord Justice Mummery's framework for dealing with cases in which human rights might be infringed.⁷³ *Haslem* is arguably a case where proportionality would have reached a different conclusion to the 'band of reasonable responses'. Although the dismissal was found to be fair, applying the justification under Article 8(2) may well have failed – particularly on the grounds that a lesser sanction may have been available. One difficulty is that the courts may consider it necessary for them to be prompted by the claimant to consider Article 8 or 10 arguments and be pointed towards the *X v Y* framework.

An alternative way of resolving this criticism is by arguing that the separate framework propounded by Lord Justice Mummery should not be necessary. Infringing the human rights of worker should be outside the 'range of reasonable responses' available to an employer. Keith Ewing, for example, argued that an employer would not be acting reasonably in treating a reason that breaches a Convention right as a reason for dismissal.⁷⁴ Such a change would mean that the claimant would not have to make specific arguments regarding a breach of their human rights. Instead, whether a human rights infringement has occurred as a result of, or during the process of, the dismissal would become another relevant factor in determining the shape and breadth of the 'range of reasonable responses'. This route to having regard to human rights in unfair dismissal cases may assist litigants in person particularly, who are unlikely to know that they need to raise ECHR arguments for the tribunal to take them into account. It is difficult to predict whether the tribunals would embrace this mode of reasoning but if they did so, it could trigger a dramatic change in the result of unfair dismissal cases.

D. Lenient review in *Laws*

⁷³ They might have been relying on the argument, made by Lord Justice Mummery and criticised above, that the RORR test and the proportionality test would usually reach the same result in most cases.

⁷⁴ Keith Ewing, 'The Human Rights Act and Labour Law' (1998) 27 ILJ 275, 288.

A different set of issues arose in *Game Retail v Laws*.⁷⁵ The claimant was a risk investigator for the defendant retailer. As part of his duties, he created a Twitter account and formed online connections with accounts run by local stores of the defendant. His aim was to monitor any risks that may have been created from those accounts and the content they posted. Using the same account, he also formed Twitter connections with his own friends and acquaintances and communicated with them via Twitter outside of working hours. A year later, the employer became aware that the claimant had posted some offensive material on his Twitter account. During the investigation, the claimant voluntarily deleted his Twitter account. He was charged with gross misconduct on the grounds that his tweets were offensive, threatening and obscene and could be viewed by anyone, including the defendant's employees and customers. The company dismissed him summarily.

The ET found that the decision fell outside the range of reasonable responses. It considered that the primary purpose of the Twitter account was for Mr Laws to communicate outside of work on matters that did not relate to his work. He only used it in his own time and some of the offensive tweets he had explained further and their more innocuous meaning became clear. It also questioned the employer's assumptions that the public had accessed his Twitter account and linked the claimant to the company as he did not mention his work or the company in his comments. In addition, the tribunal considered that it was unclear whether the company's IT policies made it clear that inappropriate use of social media outside of working time could be considered gross misconduct.

The EAT took a different view. Two factors were crucial. First, Mr Laws had not restricted his online settings so that only his acquaintances could see his comments – they were visible to anyone who looked at his account. Second, Mr Laws' account was connected with a

⁷⁵ *Game Retail Limited v Laws*, above n. 4.

large number of the defendant's Twitter accounts with the consequence that his posts would be readily accessible to anyone using those accounts.⁷⁶ They acknowledged that some balance must be drawn between an employer's desire to reduce reputational risk stemming from social media and the employee's right to freedom of expression.⁷⁷ Although the tribunal noted that this was a case regarding private use of Twitter outside of working time and despite the fact that Mr Laws had taken immediate steps to remove the reputational risk to the employer, the court clearly viewed this case as an easy one. The EAT criticised the ET for focusing on what *they* considered to be relevant, rather than the view that a reasonable employer could take.⁷⁸ The same conclusion was reached on whether there was any offence actually caused – the employment judge had impermissibly substituted his own view of whether anyone had been offended.⁷⁹ The case was remitted for another hearing.

Laws can be criticised on three grounds. The EAT readily accepted that Mr Laws' online activity posed an actual threat to the employer's reputation. As Paul Wragg comments, 'the harm of the expression to the employer's interests is often either assumed or otherwise ignored, as if it were an apparently unimportant consideration'.⁸⁰ It is far from unimportant, however, as it is only this harm (or the risk of it occurring) that could justify labelling Mr Laws' conduct as gross misconduct and form the legitimate aim for their infringement of his human rights. Instead of making a genuine attempt to assess the likelihood of harm being caused to the reputation or interests of Game Retail,⁸¹ the EAT accepted both the employer's classification of his conduct as gross misconduct and its assertion that his actions were

⁷⁶ Ibid, at [45].

⁷⁷ Ibid, at [46].

⁷⁸ Ibid, at [47].

⁷⁹ Ibid, at [49].

⁸⁰ Wragg, above n. 4, 2.

⁸¹ We can see that the Employment Tribunal did attempt to assess the likelihood of actual harm to the employer's interests but received criticism for doing so as it strayed into the 'substitution mindset': *Game Retail Limited v Laws*, above n. 4, at [47].

sufficiently harmful to justify the deprivation of Mr Laws' livelihood. These findings are a result of the judicial deference to the view of the employer at the centre of the RORR test.⁸² The tribunals have been deprived of the opportunity to make their own assessment of fairness in each case and to articulate the desired standard of treatment of workers,⁸³ including the possibility of classifying some reasons – such an exercise of freedom of expression – as impermissible reasons for a dismissal. The standard of fairness has thus become reflective of the lowest common denominator of current employer practice, rather than a detailed analysis of the legitimacy of the employer's reason to dismiss.

The EAT's approach in *Laws* also confirms the 'dismissive treatment' of ECHR rights in dismissal cases.⁸⁴ In contrast to *Haslem*, the EAT mentioned Mr Laws' ECHR right to freedom of expression. This mention, however, was not followed by any attempt to conduct a proportionality analysis in light of the ECHR's requirements. The facts disclose a variety of considerations which could lead to the conclusion that the dismissal was a disproportionate interference with the claimant's Article 10 rights. There was very little evidence that the company had sustained damage to their reputation and Mr Laws closed his Twitter account immediately. This removed any continuing risk to the company as the content could not be viewed or recovered from that point. The courts could equally have taken into account the likely chilling effect on workplace and off-duty expression in light of such a severe sanction being meted out to a colleague.⁸⁵ It is at least arguable that a less severe sanction may have

⁸² Many authors have observed this: see for example Andy Freer, 'The Range of Reasonable Responses Test - From Guidelines to Statute' (1998) 27 ILJ 335 and ACL Davies, 'Judicial Self-restraint in Labour Law' (2009) 38 ILJ 278.

⁸³ Patrick Elias, 'Fairness in Unfair Dismissal: Trends and Tensions' (1981) 10 ILJ 201, 213 and Davies, 'Judicial self-restraint in labour law', *ibid*, 293.

⁸⁴ Wragg, *above n. 4*, 7.

⁸⁵ This is a serious factor in the ECtHR's proportionality considerations in Article 10 cases, see *Heinisch v Germany*, *above n. 7*, at [91].

been appropriate, but the operation of the RORR test does not allow tribunals to consider such questions.

One final point must be made in relation to the RORR in a human rights context. As Anne Davies has noted, proportionality has traditionally been a public law standard applied to government actors.⁸⁶ Public administrators can be safely assumed to be putting their expertise towards working for the best outcome for society and this is ensured through various public law doctrines.⁸⁷ She then points out that in labour law, we have no similar guarantees.⁸⁸ There is ‘nothing to stop the employer from behaving entirely selfishly and using its expertise for its own benefit’.⁸⁹ Such selfish behaviour could include disregarding or lacking respect for their workers’ human rights, which seemingly occurred in *Haslem* and *Laws*. This would suggest that the necessity and proportionality analysis in labour law should be *stronger* rather than weaker than the equivalent in public law. Instead, we find the tribunals being cautious and deferential to the employer’s view of the situation.

As Astrid Sanders has noted, there has been ‘remarkable continuity’ between pre-HRA cases and more recent judicial statements.⁹⁰ There is an ongoing reluctance to engage thoroughly with questions of human rights and disproportionate interferences. Although Mummery LJ set out a suggested approach over 10 years ago in *X v Y*, it has been little used. *Laws* and *Haslem* demonstrate that this is not because workplaces across the UK have become more respectful and considerate of the human rights of workers. Rather, it is because the courts and tribunals have continued the judicial ‘abnegation’ of responsibility to control the employer’s power to dismiss,⁹¹ despite continuous academic criticism and this continuation

⁸⁶ Davies, ‘Judicial Self-restraint in Labour Law’, above n. 82, at 290.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 304.

⁹⁰ Sanders, above n. 3, 342.

⁹¹ Collins, *Justice in Dismissal*, above n. 12, 29.

being contrary to the requirements of the HRA 1998 and the ECtHR's established principles. Although Lord Justice Mummery's approach introduced a proportionality analysis as a 'backstop', this test appears to only come into play where the RORR test reaches a completely indefensible result. Most cases, such as *Haslem* and *Laws*, will be still be decided by an application of the deferential RORR test and left untouched by human rights considerations. Thus, there is a complete lack of any check that an interference with an individual's human right can be justified by a legitimate aim and is proportionate to the pursuit of that aim. This section has proposed an alternative method of dealing with human rights issues in unfair dismissal cases, through which those rights would become engrained in the examination of reasonableness rather than an almost optional adjunct to the standard enquiry. Given the equally entrenched deference of the RORR test, one might fairly question whether even this modification would lead to the recalibration of unfair dismissal law that proportionality review seems to require.

4. THE REMEDIES FOR AN UNFAIR DISMISSAL

The inadequacies of the remedies for a successful unfair dismissal claim are well-known. As mentioned above, both elements of financial compensation – the basic award under section 119 and the compensatory award under section 123 – are subject to an upper limit.⁹² Non-pecuniary loss, such as injury to feelings and mental distress, is not recoverable.⁹³ Tribunals can also reduce the award given to the claimant in three circumstances: where the claimant 'caused or contributed to' the employer's decision to dismiss;⁹⁴ a deduction to reflect the possibility that a fair dismissal would have occurred shortly afterwards;⁹⁵ and the claimant may receive nothing

⁹² The Employment Rights (Increase of Limits) Order 2016, SI 2016/288

⁹³ See *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45 and *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36, [2005] 1 AC 226.

⁹⁴ ERA 1996, section 123(6).

⁹⁵ *Polkey v AE Dayton Services Ltd* [1987] 3 WLR 1153, [1988] AC 344 and *Thornett v Scope* [2006] EWCA Civ 1600, [2007] ICR 236, at [34]-[36].

at all if major misconduct upon their part is discovered after the dismissal.⁹⁶ Are these general deficiencies problematic when viewed from the perspective of remedying an interference with human rights?

The relevant ECHR articles are Article 13, which requires an effective remedy before a national authority for a breach of a Convention right, and Article 41, under which the Court affords ‘just satisfaction’ for an infringement of a Convention right. Article 13 has been little utilised, as the Court often does not examine an Article 13 complaint where a breach of another article has been established.⁹⁷ Further, the aggregate collection of remedies available is examined by the Court, in the light of the margin of discretion available to the Member State,⁹⁸ making a successful complaint unlikely. Similarly, the application of Article 41 has not led to a clear set of remedial principles.⁹⁹ The Court relies on a broad, ‘equitable assessment’ of the case under which the complainant should be returned to the position they would have been in if the infringement had not occurred.¹⁰⁰ So it is difficult to make a principled critique of the remedies of unfair dismissal law. Rather, we might compare what is included in the remedial ‘package’ at domestic and ECHR level.

Similar approaches appear to be taken to loss of earnings: it is recoverable through the compensatory award under the ERA 1996 and a lump sum is included in most cases in the ECtHR’s award.¹⁰¹ In addition, the ECtHR adds nuance to their findings through the application of Article 41: a large award indicates a particularly serious violation, whereas no award can express the Court’s disapproval of the complainant’s behaviour.¹⁰² The possibility

⁹⁶ *W Devis & Sons Ltd v Atkins* [1977] 3 WLR 214, [1977] AC 931.

⁹⁷ See for example *Redfearn v United Kingdom*, above n. 15, at [61]-[63].

⁹⁸ *Silver and others v United Kingdom* (1983) 5 EHRR 347, at [19].

⁹⁹ See Luzius Wildhaber, ‘Article 41 of the European Convention on Human Rights: Just Satisfaction under the European Convention on Human Rights’ (2003) 3 Baltic Yearbook of International Law 1.

¹⁰⁰ *Smith and Grady v United Kingdom (Just Satisfaction)* (2001) 31 EHRR 24, at [18].

¹⁰¹ *Ibid*, at [25].

¹⁰² Wildhaber, above n. 99, 6, 12, 17.

of the complainant receiving no monetary compensation at all or a nominal amount in Strasbourg indicates that the ECtHR may not object to the domestic tribunals' ability to reduce the award where the claimant contributed to their dismissal or committed gross misconduct. In contrast, I would argue the 'Polkey deduction', reflecting the possibility that a fair dismissal would have occurred soon after, would be unlikely to well-regarded by Strasbourg: if an unjustified interference with human rights has been committed, it should be irrelevant that the same events might have occurred lawfully at a later time.

This leads to further points at which the remedies of unfair dismissal appear inadequate to provide 'just satisfaction' for a breach of unfair dismissal. The ECtHR has consistently shown that non-pecuniary damages are a crucial part of its remedial package under both Article 41 and Article 13.¹⁰³ In employment cases, the awards for non-pecuniary harm range from range from €2,000 for Mrs Eweida's anxiety, frustration and distress¹⁰⁴ to £19,000 each for Ms Smith and Mr Grady in light of the 'profoundly destabilising events' of having one's private life investigated as well as the continuing emotional and psychological impact of those events.¹⁰⁵ Linked to *Smith and Grady*, the ECtHR is willing to grant more generous awards to signal that the complainant has suffered a particular serious infringement.¹⁰⁶ Domestic tribunals refuse to do the same.¹⁰⁷ Taking into account the extensive recovery for financial losses, the opportunity to receive compensation for non-pecuniary damages *and* the possibility of an inflated award due to a finding of a grave infringement, it is easy to see how 'just satisfaction' in the ECtHR may go beyond the upper limit that has been placed upon the compensation for an unfair dismissal. Hugh Collins and Virginia Mantouvalou have questioned whether the

¹⁰³ *Edwards v United Kingdom* (2002) 35 EHRR 19, at [99].

¹⁰⁴ *Eweida and others v United Kingdom*, above n. 2, at [114].

¹⁰⁵ *Smith and Grady v United Kingdom (Just Satisfaction)*, above n. 100, at [13].

¹⁰⁶ See, for example, *ibid.*

¹⁰⁷ See Lord Steyn's comments at [19]: *Dunnachie v Kingston upon Hull City Council*, above n. 93.

statutory cap is compatible with effective protection of Convention rights¹⁰⁸ - particular as there is no exception to the cap in cases where the claimant's human rights have been infringed. An arbitrary limit on the amount that one can recover in such circumstances appears to be inconsistent with the ECtHR's remedial approach.

5. CONCLUSION

The aim of this article was to demonstrate that claimants face severe obstacles to vindicating their human rights through unfair dismissal law. Its personal scope is narrow, the standard of scrutiny of employer's decisions is minimal, and the remedies deficient. As a result, many workers are left without a route to gaining protection for their human rights, or a proper remedy if they have been interfered with by their employer. Further, I would argue that the alterations required to fit unfair dismissal law to the pattern of the Convention rights are so extensive that not only are they very unlikely to occur either by judicial or legislative means but they would also reconstruct unfair dismissal to such an extent that it would no longer be the same legal structure. For example, consider the change that would be required to ensure that all those entitled to human rights receive protection through unfair dismissal law. Rather than the established category of the 'employee', or even the broader category of 'worker' used to scope some rights, every individual would have to have the right to make a claim against their employer. This would include semi-dependent workers and independent contractors, which have usually been considered to be beyond the bounds of labour law's protection. Correcting the inadequacy of unfair dismissal law's personal scope would amount to such a fundamental alteration to the core of the cause of action that it would be questionable to say the result maintained continuity with 'unfair dismissal law'. A similar point could be made regarding reshaping the 'fairness' test around the proportionality formulae. We might conclude therefore

¹⁰⁸ Collins and Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal', above n. 1, 921.

that not only is unfair dismissal law incapable in its current form to protect the human rights of workers, but also to perform this task the reform would have to be extensive and would alter the essence of the cause of action completely.

Is there an alternative route to vindicating the human rights of workers? It has been suggested that implied terms could be developed to ensure that employers are required to respect the human rights of their workers.¹⁰⁹ Although this may be an appealing idea which does not require the legal contortions outlined above, the judicial insistence that implied terms do not apply to the employer's decision to dismiss would be a major stumbling block on this route. In *Johnson v Unisys*, the House of Lords held that the term of mutual trust and confidence – which under this suggestion would be extended to include a requirement that employers respect the human rights of their workers – cannot be invoked to gain compensation for a dismissal.¹¹⁰ It might be a useful tool for workers who suffer detriment connected to their human rights that fall short of dismissal, but this possibility appears to be closed for claimants who suffer the most severe infringement with their human rights. An argument might be made that an extension of the implied terms of the employment contract is necessitated by the positive obligations placed upon the UK by the ECHR, in light of the inadequacies of the existing standard of protection of human rights in the workplace, but further work is required to determine how successful this argument would be when opposed with strong claims regarding the division of power between Parliament and the courts, which was the linchpin of many of the arguments in *Johnson*.

To conclude, there appears to be no straightforward path to vindicating human rights that are infringed in the course of the employment relationship, or by its termination. Unfair

¹⁰⁹ Hugh Collins and Virginia Mantouvalou considered this possibility in their chapter in the *Contract of Employment* and similarly doubted its likelihood: Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment', n. 5 above, 206-207.

¹¹⁰ *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518.

dismissal's protection is only available to a limited class of claimants and the infringement would have to be obvious and egregious for the court's attention to be properly drawn to the requirements of proportionality that must be applied to ensure the claimant's rights are protected. Another possibility is expanding the terms implied into the contract, and to bring a suit based on an interference with human rights through wrongful dismissal. Here, principled constitutional objections arise, limiting the potential of this route to enforcing human rights in the workplace. Claimants, particularly those in the private sector, are thus left exposed to breaches of their human rights perpetrated by employers which will continue to go uncorrected and un-remedied in the courts.

DRAFT